
Subject: RE: State of Oklahoma v. Tyson, et al. Plaintiff's claim for Agency response costs.

From: Xidis, Claire [mailto:cxidis@motleyrice.com]
Sent: Friday, March 27, 2009 2:23 PM
To: Ehrich, Delmar R.; rnance@riggsabney.com
Cc: Jorgensen, Jay T.; George, Robert; John Elrod; rsanders@youngwilliams.com; Theresa Noble Hill; Walker, Todd P.; Dolan, Christopher H.; Scott McDaniel; James Graves; Louis Bullock; Richard Garren; Mark_Quayle@cargill.com; Walker, Todd P.; Jones, Bruce; Kleibacker Lee, Krisann C.; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov; Kelly.Burch@oag.ok.gov; David Riggs; David Page; Richard Garren; Moll, Ingrid; Baker, Fred; Ward, Liza; Sharon Gentry; bblakemore@bullock-blakemore.com; Louis Bullock
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Delmar -

The Court's March 24, 2009 Amended Order is clear that it was only granting the State's motion for an extension of the discovery deadline for taking Defendants' damages experts. The State's motion for extension was expressly "for the *limited* purpose of taking the depositions of *Defendants'* damages experts" (Dkt. # 1923 at 1), and nothing in the Court's Order even suggests that it was extending the deadline for any other purpose. Since it is evident from your email that Defendants are misinterpreting this Order, and taking the last sentence of the Order completely out of context from all of the preceding text in the Order, the State will be filing a motion for clarification on this issue promptly (with a request for expedited consideration) unless you put in writing to me by 5:00 pm eastern that the Defendants agree that the Amended Order **ONLY** extends the discovery deadline for depositions of the Defendants' experts disclosed on March 31.

As for the other issues in your email, the State's position regarding the sufficiency of the Stratus Report was made clear to you in early February, and has not changed since that time, except for my good faith efforts to work out a compromise with you, which you have completely ignored. If Defendants thought that such a motion was necessary, they could have filed it any time between Jan. 6, 2009 and the present. Defendants' delay in seeking Court intervention on this issue demonstrates that it lacks merit, and Defendants' continued refusal of numerous depositions dates for the Stratus experts is simply a transparent attempt to throw off the discovery schedule and the trial date.

For the record, "building blocks" was a term you introduced into our conversation last Friday. I have it in quotes in my notes as a term you continually used during our call. Please refrain from attributing your arguments and terminology to me.

When you accepted the dates for the depositions of the Stratus witnesses earlier this week, we advised them that they needed to plan to be in Tulsa on these dates, and some of them started booking flights. If Defendants do not take the depositions on the dates they accepted, we will be sending you a bill for any incurred expenses. If Defendants do not agree that they should cover these costs, we will seek input from the Court on this issue.

Liza Ward sent you an email offering a deposition date for David Payne on Tuesday at 9:24 pm EST.

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From: Ehrich, Delmar R. [mailto:DEhrich@faegre.com]
Sent: Friday, March 27, 2009 1:02 PM
To: Xidis, Claire; rnance@riggsabney.com
Cc: Jorgensen, Jay T.; George, Robert; John Elrod; rsanders@youngwilliams.com; Theresa Noble Hill; Walker, Todd P.; Dolan, Christopher H.; Scott McDaniel; James Graves; Louis Bullock; Richard Garren; Mark_Quayle@cargill.com; Walker, Todd P.; Jones, Bruce; Kleibacker Lee, Krisann C.; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov; Kelly.Burch@oag.ok.gov; David Riggs; David Page; Richard Garren; Moll, Ingrid; Baker, Fred; Ward, Liza; Sharon Gentry; bblakemore@bullock-blakemore.com; Louis Bullock

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Claire:

I ask again that the plaintiff provide a complete Rule 26(a) disclosure for each of the seven authors of the Stratus report it expects to testify at trial. Rule 26(a) plainly requires plaintiff to do so. Precedent also plainly establishes that an offer to make potential testifying experts available for deposition does not cure the prejudice to an opposing party resulting from the lack of complete expert disclosure under Rule 26(a). An opposing party need not depose each potential expert in an attempt to sort out what the proponent of such experts should have disclosed. Plaintiff plainly cannot call each of the seven Stratus authors to testify to the same opinions; after the first such expert testimony, the rest would be excluded as cumulative. Indeed, as experienced trial lawyers you know that the Court will never allow plaintiff to call seven experts to testify as to the same opinions. And I think you've acknowledged as much in your conversation with me, in which you described using the Stratus experts in a "building block" fashion -- in short, some smaller number of the Stratus authors called to testify to discrete steps in or portions of the CV process and resulting conclusions.

So the plaintiff is playing a game of "hide the testifying expert," to the detriment of the defendants.

As to the deposition schedule, you keep insisting that the plaintiff has offered the the Stratus authors for their depositions on several occasions. However, the defendants have been forced to negotiate out of necessity because of the plaintiff's failure to make the required expert disclosure and refusal to agree those depositions may be taken out of time.

Now that the Court has continued the discovery deadline until May 15, the defendants will not take any Stratus depositions until after the court has resolved that the scope of disclosure issue. We do not want to waste our resources or the time of your experts on depositions that might not ultimately be necessary after our review of a complete disclosure.

If the plaintiff refuses to make a complete disclosure, we intend to seek promptly relief from the court in a motion to strike the Stratus report or, in the alternative, for complete Rule 26(a) disclosures as to each Stratus author the plaintiff may call to testify at trial.

Will the plaintiff agree to make the disclosures required by Rule 26(a)?

If not, we will file the motion. We intend to seek to expedited consideration of that motion.

I look forward to hearing from you by the close of business today on both points.

Del